No. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NORTON ANTHONY RUSSELL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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MISCELLANEOUS

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OPINION BELOW

The opinion of the Court of Appeals in affirming Petitioner's conviction is reported at 280 F(2) 688, and is set forth at R. 166-167. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals affirming Petitioner's conviction was entered June 18, 1960. R. 168. The Petition for a Writ of Certiorari was filed on July 15, 1960, and granted on June 19, 1961 (R. 169; 366 U.S. 960). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was tried by jury and convicted on an indictment for contempt of a Subcommittee of the House Committee on Un-American Activities at a hearing held in the District of Columbia in November 1954. In this context, the questions presented are:

1. Whether in a case concerning communism Petitioner is entitled to a dismissal of the indictment upon an uncontradicted showing that of the twenty-three members of the grand jury eleven were employees of the Federal Government and two were employees of the District of Columbia Government, and that such employees generally are in fact biased against a defendant because of the pressures generated by official loyalty-security programs; and if not so entitled, whether upon such showing Petitioner was at least entitled to a hearing to determine the extent of the actual bias in fact among such thirteen grand jurors against Petitioner.

2. Whether the indictment was required to state what subject was under inquiry and the relationship of the questions asked to that subject.

3. Whether Petitioner has been effectively deprived of his right to a trial by jury because:

(a) The trial judge applied a conclusive presumption that Petitioner's testimony was demanded in aid of a legislative purpose, although undisputed, objective evidence showed that Petitioner's testimony served no legislative purpose and was demanded only in order to punish him for contempt; and

(b) The trial judge personally decided the issue of the authority of the Committee Chairman to appoint

subcommittees adversely to Petitioner as a matter of law, although all the evidence on the issue was oral, and there were no documents to interpret; and

(c) The trial judge charged, in effect, that testimony of the appointment of a subcommittee with "X" as Chairman to sit in Dayton could be taken as proof of the appointment of a subcommittee with "Y" as Chairman to sit in Washington; and

(d) The trial judge refused direction of a verdict for lack of sufficient proof of the appointment of the Subcommittee of three which heard Petitioner, although there was no evidence at all as to the appointment of two of them, and the evidence of the appointment of the third of the three consisted solely of his own testimony which was self-contradictory on the point.

4. Where authority to a Committee Chairman to appoint subcommittees does not specify the method of appointment can the Chairman validly appoint a subcommittee by mere telephone call with no record made.

5. Does a witness commit contempt when at the outset of his second appearance he clearly refuses, as he had on his first appearance, to answer any questions on the subject of communism; and, if so, can he be validly tried and punished for each reiterated refusal to answer specific questions on the subject of communism which follow after his complete declinature.

6. Does the proof of pertinence at trial support the conviction of Petitioner.[1]

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[1] On this point which was not raised in the Petition for Certiorari Petitioner appeals to the power of the Court to pass on plain and prejudicial error apparent on the face of the record.

STATUTE INVOLVED

2 U.S.C. Sec. 192, R.S. 102 (52 Stat. 942), as amended, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

The indictment here (R. 3) was for contempt of a Subcommittee of the House Committee on Un-American Activities at a hearing held in the District of Columbia in November 1954. It alleges in separate counts, with one question to each count, that Petitioner unlawfully refused to answer the questions set forth. Otherwise the indictment merely asserts the questions to have been "pertinent to the question then under inquiry."

The questions on which Petitioner was convicted were these:

1. Whether you did or whether you didn't join [the Communist Party] at that time, did he [Herbert Reed] encourage you to join? [Count Two]

2. I want to know whether Herbert Reed had anything to do with your getting into the Communist Party. [Count Three]

3. Did you have any knowledge of the existence of that group [an organized group of the Communist Party in Yellow Springs] in 1945 or 1946? [Count Four]

By motion to dismiss the indictment (R. 7), motion for hearing on qualifications of grand jurors (R. 5), motion for a directed verdict or in the alternative for a judgment of dismissal (R. 19), pertinent requests for jury charges (R. 21), all of which were refused or denied (R. 15, 139, 149), by statement of points on appeal to the Court of Appeals, and by Petition for Certiorari, all of the questions presented were, with one exception,[2] unquestionably raised and preserved.

Petitioner was indicted in December 1954 (R. 2), following more than seven years of official loyalty-security programs (R. 10). Of the twenty-three members of the grand jury which indicted Petitioner, eleven were employees of the Federal Government (including the Foreman who was employed by the Department of State) and two were employees of the District of Columbia (R. 5). In support of his motions for dismissal of the indictment for lack of an impartial grand jury, or for hearing on the qualifications of the grand jurors, Petitioner presented proof consisting of the uncontradicted affidavits of two experts in the field (R. 12-13), to the effect that such employees generally are in fact biased against a defendant in a case concerning communism because of the pressure generated by official loyalty-security programs. The experts, Dr. Maria Jahoda and Dr. Stuart W. Cook, Head of the Department of Psychology, Graduate School of Arts and Science, New York University, both social psy-

[2] See Fn. 1, p. 3.

chologists, had conducted a study on the impact of loyalty-security programs on Government employees in Washington, D. C. (R. 12-13). Petitioner offered, if hearing on grand juror qualifications were afforded, to show by the testimony of Drs. Jahoda and Cook, by the testimony of other named experts in the loyalty-security field, and by the testimony of the grand jurors concerned that such grand jurors were biased in voting in favor of Petitioner's indictment (R. 13-15). The opportunity was not afforded (R. 15).

At the trial, the evidence on a second issue was also not in dispute. The issue was whether Petitioner on the occasion of the alleged contempt was required to testify in aid of some legislative purpose or to commit contempt for which he would be punished. The evidence follows.

The alleged contempt was in Washington in November 1954. In September of 1954, Petitioner, a resident of the Dayton area, responded to a subpoena to appear in Dayton, Ohio, before a Subcommittee of the House Committee on Un-American Activities (R. 33, 61). Committee counsel called him then because he thought Petitioner would cooperate and testify "or [he] would not have called him, in all probability" (R. 68); and, when Petitioner did not cooperate, Committee counsel, to use his own words, "broke the questioning up and did not follow through on it" (R. 68).

At Dayton, Petitioner claimed a First Amendment privilege, against disclosure of his "opinions, political beliefs, and associations," and declined to answer the very first question asked of him which pertained to communism. That question was whether as an undergraduate at Antioch College Petitioner was aware of

a Young Communist League organization within the student body (R. 61-62). On the basis of the same First Amendment privilege, Petitioner declined to answer all questions concerning communism, and specifically questions concerning the circumstances under which he had met one Herbert Reed; whether Petitioner had paid dues to the Communist Party in Dayton before moving to Yellow Springs in 1948; whether Petitioner was in the Communist Party at any time prior to moving to Yellow Springs in 1948; and whether Petitioner is a member of the Communist Party (R. 61-63). After these declinatures, Committee counsel announced: "I have no further questions" (R. 63); and Petitioner was completely excused (R. 63).

Although the Subcommittee at Dayton had started with all three members present on the day of Petitioner's appearance, there was only one member left and present by the time of Petitioner's appearance to hear his testimony (R. 61, 106). Committee counsel was aware of this lack of a legal quorum during Petitioner's appearance, and had it in mind when he broke off his questioning of Petitioner (R. 64, 107).

Committee counsel testified at the trial. At the close of Petitioner's appearance in Dayton, he had further questions and expected to get a Committee ruling as to recalling Petitioner (R. 63-64). So he testified; although at Dayton he announced having no further questions, and permitted Petitioner to be completely excused (R. 63). Committee counsel thought that Petitioner might not claim his First Amendment privilege if called to testify again, because when served with a new subpoena to appear in Washington in November Petitioner showed a desire to get in touch with a

Committee staff member (R. 64-65). However, the subpoena was not served until after the making of the decision to subpoena Petitioner for his appearance in Washington; and Petitioner's desire for a conference was to change the stated time for his appearance (R. 65).

At the time of Petitioner's appearance in Washington, the Chairman of the Committee group which heard him announced that the shortness of time allotted to the Dayton hearings had "resulted in the necessity of continuing that hearing by calling several witnesses for further testimony" (R. 67). However, three witnesses had testified at Dayton after Petitioner had testified; and one of them was a volunteer witness, unexpected and uninvited, who was permitted to testify at his own request after the hearings had already been closed (R. 67-68).

Two witnesses at Dayton, other than Petitioner, had declined to answer questions on a First Amendment claim of privilege. These declinatures were in the presence of a legal quorum. Neither witness was called to Washington for further testimony. Both were cited for contempt at Dayton and indicted there (R. 69-70). Petitioner was the only Dayton witness called for a further appearance at Washington; he was the only Dayton witness who claimed a First Amendment privilege in the absence of a legal quorum (R. 79).

At the Washington hearing, the Petitioner claimed precisely the same First Amendment privilege against forced disclosure of his "opinions and political beliefs and associations" (R. 66) as he had claimed at Dayton. And he made that claim at the very outset of the hearing in declining to answer the very first

question which concerned communism (R. 66). The taking of this stand by Petitioner in Washington admittedly ended any hopes that he "might cooperate with the Committee" and answer questions concerning communism (R. 113). Immediately upon Petitioner's general refusal at the outset to answer questions concerning communism, the Chairman, Mr. Clardy, sought and obtained a specific disclaimer from Petitioner of any reliance on the Fifth Amendment (R. 66); and, then, Committee counsel, in covering the same field of questioning as at Dayton, went on to ask the sixteen questions which provided the counts in the indictment (R. 3-4, 62-63, 67, 123-132). It was believed by the Committee and Committee counsel that at Washington they had a legally competent body to receive Petitioner's declinature (R. 65).

Upon the foregoing facts, Petitioner moved for a directed verdit on the ground that "the proof fails to show that in questioning defendant the Committee was pursuing a legislative purpose [but] rather, the proof shows that defendant was called to testify in order to punish him for contempt" (R. 20), and upon the further ground that "the proof shows that if defendant committed any crime of contempt, the crime was committed when, before any of the questions specified in the indictment, he made it clear that he was not going to answer any questions involving Communist Party membership or activities on his part" (R. 20). The motion was denied (R. 139). The specific requests of Petitioner for charges to the jury which would submit both issues were denied (R. 24-25). The Court informed the jury that as a matter of law the "inquiry was for a legislative purpose" (R. 156).

We turn to a summarization of the case on the two aspects (authority to appoint and action taken to appoint) of whether the three Congressmen, chaired by Mr. Clardy, before whom Petitioner appeared in Washington were legally appointed as a Subcommittee of the House Committee on Un-American Activities. The summary follows.

The Rules of the House of Representatives, applicable to the House Un-American Activities Committee, provide: "A Committee may adopt rules under which it will exercise its functions . . . and may appoint subcommittees" (R. 134). Committee counsel testified that there was no rule of the House on "who should be the one to appoint members of a subcommittee" (R. 104). The practice of the Committee was for the Chairman of the Committee to appoint subcommittees; and, in conformity with that practice, the Committee in January 1953 adopted a resolution authorizing the Chairman to appoint subcommittees (R. 135). So Committee counsel testified; but no resolution was offered. Neither the House nor the Committee has any rule with respect to the method by which the Chairman should appoint subcommittees (R. 134). The practice of the Chairman was to appoint subcommittees by personal interview or telephone (R. 116).

Petitioner urged to no avail that the question of the authority of the Committee Chairman to appoint subcommittees was one of fact, and that hence the foregoing evidence should be heard by the jury (R. 99, 103, 144). The Court excluded the jury (R. 91, 99, 103); refused a specific request for a charge submitting the issue of the Chairman's authority to appoint subcommittees for jury determination (R. 23); and in-

formed the jury as a matter of law that the Committee Chairman was authorized to appoint subcommittees, and could do so by telephone (R. 156).

The group before which Petitioner appeared in Washington had Mr. Clardy as Chairman, with Messrs. Scherer and Walter as ordinary members (R. 91, 120). All of the evidence on whether this Clardy group had been appointed as a subcommittee by the Chairman came from two Government witnesses, Messrs. Scherer and Tavener. In rejection of Petitioner's view that all of his testimony should be passed on by the jury (R. 31, 32-33), Mr. Tavener, Committee counsel, testified both in and out of the presence of the jury. He testified that at an executive Committee hearing in August 1954, the Chairman appointed a subcommittee of *Congressman Scherer as Chairman* with Messrs. Clardy and Walter as ordinary members to hold hearings *at Dayton* at any time prior to *three weeks before the election in the beginning of November* (R. 115, 119). This was out of the presence of the jury (R. 120). In the presence of the jury (R. 120), Government counsel emphasized "Clardy," "Scherer" and "Walter" as the names of the three man group before whom Petitioner appeared at Washington, and merely asked: "Are Congressmen Clardy, Scherer and Walter the same members of the Un-American Activities Committee which you state were appointed by Chairman Velde on August the 9th, 1954, at the time that the full committee authorized taking hearings?" To which Mr. Tavener simply answered: "They are, yes" (R. 120-121).

Mr. Scherer, a member of the group before which Petitioner appeard at Washington in November 1954,

testified on cross-examination that the Committee Chairman had telephoned him during the noon recess on the day of Petitioner's appearance "and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the Chairman of the subcommittee, for the purpose of conducting the hearings that afternoon" (R. 87). On re-direct examination, Mr. Scherer, under the guidance of Government counsel, also testified that Mr. Clardy was to be Chairman of the subcommittee for the purpose of conducting the hearings that afternoon (R. 89).

Petitioner's motion for a directed verdict because of the lack of a sufficient showing of a properly constituted body (R. 19) was denied (R. 139). The trial judge in his own charge on this issue stated that the jury need only find that "the Chairman of the full committee had theretofore designated and appointed Representatives Clardy, Scherer and Walter as subcommittee for the purpose of conducting such hearings" (R. 157); and, further informed the jury that they could find such appointment either in the executive session of the Committee in August or by telephone on the day of Petitioner's appearance (R. 158). By this instruction to the jury, the trial judge permitted, indeed encouraged, the jury to find the appointment of the *Washington* subcommittee with *Clardy* as Chairman from Mr. Tavener's testimony of the August appointment of a subcommittee. But the jury was kept from hearing that the August appointment was of a *Dayton* subcommittee with *Scherer* as Chairman, and hence irrelevant to the appointment of the *Washington* subcommittee chaired by *Clardy*.

The indictment did not specify the subject under inquiry (R. 3). At the beginning of Petitioner's trial,

the Government stated its trial position to be that the subject under inquiry was as broad as the powers conferred upon the Committee by H. Res. 5 which established it; but that the Government could also offer proof of "special pertinency."[3] Pursuant to the announced position of the Government as to the subject under inquiry, Committee Counsel testified that the "particular purpose of the Committee" as announced by the Chairman at the outset of the hearings in which Petitioner testified was "Communist Party activities in the labor movement in industry, in educational institutions," "the leadership in the United Electrical, Radio and Machine Workers of America in the Dayton area," and "particularly" the strike at the Univis Lens Corporation. According to Committee counsel, the foregoing "summarizes the purpose of the hearing" at which Petitioner's contempt is claimed (R. 34-35). But, on motion of the defense, Committee counsel's statement of the subject under inquiry was striken so far as it did not conform to the Chairman's announcement at the outset of the hearings (R. 37).

The Government introduced the Chairman's announcement of the subject under inquiry. That an-

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[3] The Government's exact statement on the subject was (R. 43):

> It is the position of the Government that this particular committee may call anyone available to it as a witness to inquire about matters that have to do with its resolution, that is, subversive activities, no matter who that person may be, because it has been held that personnel is part of the subject, and the numbers of persons that are engaged in that activity or that know about it would be possible sources of information. In spite of that position, that we do that, we also feel that we are entitled, nevertheless, to offer proof of special pertinency.

nouncement (R. 38-42), made at the beginning of the series of hearings in which Petitioner testified, went as follows: A summary of H. Res. 5; a reference to the cold war with Russia and Communist China being the cause of the Committee's investigation of the "Communist conspiracy"; the authorization by Congress of 160 billions for the nation's security; the observation that one "Communist agent" within our borders is more dangerous than 10,000 enemy troops; the observation that the Kremlin has taken 600 million people behind the iron curtain by "boring from within"; a recitation of Committee activities and communist objectives, and what "Mr. Average American" has learned as a result; a recitation of some subjects in which "the Committee as such has no interest" as, for example, "the labor movement"; the Committee's being "engaged . . . in throwing light upon the nefarious and subtle activities of those individuals who are promoting the Communist conspiracy so that . . . the average American may know them"; a denial of exaggeration of "the Communist danger"; the bad faith of witnesses who invoke the Fifth Amendment; and the pleasure of the Committee in the passage by Congress of an immunity law recommended by it. The Chairman did conclude with a statement that "for some time there has been a rather intense controversy in the Yellow Springs area" and that "complaints . . . from the Dayton-Yellow Springs area" resulted in the hearings about to start (R. 42). But neither the Chairman, nor anyone else, ever stated what the "rather intense controversy" was; and the defense's questioning directed to eliciting what "the complaints from the Dayton-Yellow Springs area" were about was prohibited on successful objection by the Government of "a fishing expedition" (R. 80).

In proof of "special pertinency," the Government introduced the testimony of two witnesses, Strunk and Wornstaff, who had preceded Petitioner at the hearings. Strunk, a member of the Communist Party in Dayton at the request of the Federal Bureau of Investigation, had testified (R. 43-50) that the main objective of the Communist Party in Dayton was infiltration in labor unions and building up strikes (R. 48). As to Petitioner, Strunk had stated that he was a member of the Communist Party in Dayton before moving to Yellow Springs at some time prior to 1950 (R. 48-49). As to Herbert Reed (a name involved in two of the three counts on which Petitioner was convicted), Strunk merely identified him as a Communist Party officer who had already left Dayton when Strunk became a member of the Communist Party in 1944 (R. 46, 49). Wornstaff, President in 1948 of Local 678, U.E.-C.I.O., had testified (R. 50-56) to aspects, Communist and otherwise, of the Univis Lens Corporation strike in which his Local was engaged in 1948. His only reference to Petitioner was to state that Petitioner is not a member of Local 678 (R. 54). There is no mention of Herbert Reed in Wornstaff's testimony.

In further proof of subject under inquiry and pertinence, the Government introduced portions of the Committee's Annual Report for 1954 (R. 57). The Annual Report (R. 57-60) sets forth the legislative status of recommendations made by the Committee on: capital punishment for peace time espionage; immunity for certain witnesses; admissibilty of wiretapping evidence; elimination of Communist Party control over certain labor unions; withdrawal of military commissions from persons claiming the Fifth Amendment; outlawing of the Communist Party; and requiring

Government contractors to supply affidavits of non-membership in the Communist Party. With reference to the Dayton hearings, the Annual Report specifically stated that those hearings were a continuation of "the committee's investigation of Communist infiltration in basic industries throughout the United States" (R. 58). Nevertheless, the Report goes on to state that (R. 58-59): "During your committee's hearings in Dayton, Ohio, several witnesses connected with various institutions of higher learning in the United States were subpoenaed." Those witnesses included a Mr. Metcalf who admitted his participation in a Communist group at Antioch College in 1945 but refused to name his associates (R. 59).

Finally, as to subject under inquiry and pertinence, Committee Counsel testified that of the matters entrusted to the full Committee no particular subject was singled out for the Dayton hearings (R. 115).

Such is the whole of the Government's proof at trial so far as it was offered for the purpose of showing subject under inquiry and pertinence. The trial judge refused to direct a verdict (R. 139). He ruled twice that the questions on which Petitioner was convicted were "pertinent to the subject under inquiry" (R. 132, 138), and so instructed the jury (R. 156), without indication of what he believed the subject under inquiry to be. The Court of Appeals in affirming Petitioner's conviction had only this to say on the point (R. 167): "The judge determined here that the questions were pertinent, and we find no ground on which to disagree."

The sentence on each of Counts Two, Three, and Four was thirty days' imprisonment and a fine of Five Hundred Dollars, "said sentences . . . to run concurrently" (R. 29).

SUMMARY OF ARGUMENT

I.

It was Petitioner's right to be put to trial only upon indictment by the Grand Jury. Grand Jurors, no less than Petit Jurors, are required to be impartial and to have the appearance of impartiality. Thirteen of the 23 man grand jury here were government employees. The indictment against Petitioner was returned in December 1954, when the latest of more than seven continuous years of official loyalty-security programs for government employees was still current. By that time, as our uncontroverted proof at trial showed, government employees in general were so intimidated by the fear of personal security consequences as to be incapable of passing unbiased judgment on charges involving communism. The presence of a majority of such government employees on the grand jury here seriously prejudiced Petitioner; for the grand jury had to adjudicate the existence or absence of probable cause on at least two difficult issues—a pertinent subject of inquiry, amid a welter of conflicting possibilities; and a legislative purpose in the demand for Petitioner's testimony. This is just such a case as the opinions of the Court in *Frazier*, *Dennis*, and *Morford* envisaged. Petitoner's motion to dismiss the indictment for lack of an unbiased grand jury should have been granted.

At a minimum, Petitioner was unquestionably entitled to the alternative he requested in May 1956, of a hearing to determine the existence of actual bias in the thirteen government employees who sat on the grand jury. Because of the change in the Washington loyalty-security climate since 1956, we respectfully suggest that the proper remedy today for failure to accord

Petitioner such a hearing in 1956 is the dismissal of the indictment.

II.

The indictment merely used the words of the statute in charging that the questions which Petitioner refused to answer "were pertinent to the question then under inquiry." The failure to specify "the question then under inquiry" vitiates the indictment. The controlling precedents in this Court requiring that result are particularly applicable here. Usually difficult of certain ascertainment in any case, the question under inquiry was surely not known to Petitioner at the time of indictment—entirely apart from any presumption of innocence. The grand jury, in failing to specify the question under inquiry, left a blank which the prosecutor, trial judge, or Court of Appeals, could fill in differently, and for all we know did. To permit that is to abrogate the well-settled rule against amendment of indictments, and to abdicate this Court's power of review in this type of contempt case. Unless the indictment specifies the question under inquiry, the Court cannot discern whether the grand jury found probable cause as to the elements of a punishable offense, or whether, if the Grand Jury did, the Petitioner was convicted of that offense. Yet the fairness required by due process does not allow a conviction to stand where, as here, it remains most likely that an essential element of the offense, i.e. the question under inquiry, meant one thing to the Grand Jury and something very different to the trial judge or reviewing Court. That the questions asked of Petitioner invaded his normal First Amendment rights is all the more reason for the Court to insist upon the grand jury's statement of the question under inquiry.

Finally, if, in this connection, Petitioner's rights under the First, Fifth, and Sixth Amendments are to be balanced against the Government's need to continue with indictments specifying no question under inquiry, the scales must incline heavily on Petitioner's side. The lack of specification has seriously and continuously prejudiced Petitioner's defense in the trial court, the Court of Appeals, and here. On the Government's side of the balance there is so little. A question under inquiry is difficult to ascertain, which is only the more reason for making sure by its specification that a proper and correct one has been ascertained. But once ascertained, a question under inquiry is easily stated in a few words. Until recent years, contempt indictments did state the question under inquiry. There was no good reason for the indictment not to state it here.

III.

Just before Petitioner was asked the questions on which he was indicted, he declined to answer any such questions on precisely the same grounds as he had used in declining to answer substantially the same questions on an earlier appearance. At that point, as Committee Counsel conceded at the trial, there was no hope of Petitioner's answering the indictment questions. All of the pertinent circumstances further reinforce the conclusion of fact that answers to the indictment questions were demanded of Petitioner for the invalid purpose of punishing him for contempt and not to get information in aid of a legislative purpose. The decisions do not preclude adjudication of the issue of punishment or legislative aid. Rather, the decisions require consideration and decision on it. As Petitioner requested, a verdict should have been directed, or, at least, the issue should have been submitted to the jury.

IV.

Under this heading, we summarize four separate but connected reversible errors made at trial in connection with determination of the legality of the Washington group which heard Petitioner.

Admittedly, the Congressional group before whom the alleged contempts were committed were appointed as a Subcommittee by the Chairman of the full Committee, or they were not appointed at all. The Chairman's authority so to appoint was a contested issue at the trial. The evidence on the issue, all oral, was in conflict. Credibility was important. The issue was a factual one. Determination of it rested essentially on whether, in the face of testimony that only the full Committee could appoint subcommittees, a Government witness was to be believed in his assertion that the Committee had adopted a resolution (never produced) authorizing the Chairman to appoint subcommittees. Nevertheless, the trial judge decided the issue as a matter of law, and adversely to Petitioner. This deprivation of Petitioner's right to a jury trial was a prejudicial error.

On the facts here, the authority, if any, conferred upon the Chairman to appoint subcommittees failed to specify the method of appointment, and the Washington group which heard Petitioner were appointed as a Subcommittee by telephone, if appointed at all. In these circumstances, the trial judge charged the jury that appointment of the subcommittee by telephone would be legal. This Court should hold that Committee authority to its Chairman to appoint subcommittees without specification of method is limited to a method more formal and definitive than a mere telephone call without any record made. No less is appropriate when

compulsion upon pain of jailing for contempt is used in a First Amendment area.

The Washington group which heard Petitioner had Mr. Clardy as Chairman and Messrs. Walter and Scherer as members. The whole of the Government's proof on the appointment of that group consisted of: (1) a statement by Mr. Scherer of his appointment to a subcommittee of which Mr. Clardy was to be Chairman; (2) a contradictory statement by the same Mr. Scherer that his appointment was to a subcommittee of which he was to be Chairman; and (3) no evidence at all of the appointment of Messrs. Clardy and Walter. In refusing a directed verdict, the trial court erroneously permitted the jury to engage in speculation on the appointment of the Washington group that heard Petitioner.

The trial court plainly committed a fourth reversible error in instructing the jury that the appointment of the Washington group with Mr. Clardy as Chairman could be derived from the appointment of a subcommittee with Mr. Scherer as Chairman to hold hearings in Dayton.

V.

The contempt, if any, committed by Petitioner was complete when he refused to answer any questions concerning communism. Thereafter, the subcommittee could not multiply the contempt, and the punishment, by asking the indictment's individual questions concerning communism and repeatedly eliciting the same refusal. *Yates* v. *United States,* 355 U.S. 66, and other authorities cited.

True, the contempt, completed on Petitioner's refusal to answer any questions concerning communism,

continued through each individual question on which he thereafter declined. *Yates* v. *United States, supra.* Petitioner, however, had a right to be tried only upon the indictment of the grand jury. The indictment did not charge Petitioner with one continuing contempt, but alleged sixteen separate contempts which under *Yates* were not punishable. Petitioner has never been afforded the opportunity of meeting a charge of one continuing contempt. His conviction of multiple, individual contempts cannot, consistently with Due Process, be now sustained on the basis of one continuing contempt that was never charged.

VI.

The Government was required to prove a subject under inquiry. *Deutch* v. *United States,* 367 U.S. 456. For a subject under inquiry the Government relied on H. Res. 5, the resolution which established the Committee. But H. Res. 5 cannot validly serve as the subject under inquiry. *Watkins* v. *United States,* 354 U.S. 178. At trial, the Government touched on a number of possible subjects of inquiry. But none of these was connected to the indictment questions, or relied on in this Court by the Government. Instead, the Government now claims a subject under inquiry which was not offered as such at trial. In these circumstances, the trial court rather plainly found pertinence on the invalid basis of H. Res. 5 as the subject under inquiry. In any event, no other subject was proven beyond a reasonable doubt. A verdict should have been directed as requested by Petitioner.

ARGUMENT

I. The Conviction Was Invalid Because Petitioner Was Deprived of His Rights to Impartial Grand Jurors.

1. *Petitioner's right to impartial grand jurors.*—It was Petitioner's right to be put to trial only upon indictment by the Grand Jury. 2 U.S.C. Sec. 194; Constitution, Art. V. The indictment of Petitioner, like any indictment, was "no more than an accusation." See p. 126 of Brief for the United States in *Gold* v. *United States*, 352 U.S. 985, No. 137, Oct. Term 1956; *United States* v. *Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951); *United States* v. *Knowles*, 147 F. Supp. 19, 21 (D.C.D.C., 1957). But it does not follow that the composition of the Grand Jury matters not. This Court rejects the contention that who is on a grand jury is immaterial. *Cassell* v. *Texas*, 339 U.S. 282; *Pierre* v. *Louisiana*, 306 U.S. 354. The Grand Jury is not an adjunct of the prosecutor's office.[4] Established in Anglo-Saxon institutions since Magna Charta, the Grand Jury has continuously served through the centuries to protect the citizen against being put to trial upon prejudiced and unfounded accusations.[5] The

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[4] *Stirone* v. *United States*, 361 U.S. 212, 217; *Ex Parte Bain*, 121 U.S. 1; *In re National Window Glass Workers*, 287 Fed. 219 (N.D. Ohio, 1922); *Stanley* v. *State*, 171 Tenn. 406, 416, 104 S.W. (2) 819, 822 (1937); *Ex Parte Peart*, 5 Cal. App. (2) 469, 473, 43 Pac. (2) 334, 336 (1935).

[5] *Ex Parte Bain*, 121 U.S. 1, 11; *Beavers* v. *Henkel*, 194 U.S. 73, 84; *Hale* v. *Henkel*, 201 U.S. 43, 61-62; *United States* v. *Johnson*, 319 U.S. 503, 513; *Application of United Electrical, Radio, and M Workers*, 111 F. Supp. 858, 866 (S.D.N.Y., 1953); *Maley* v. *District Court of Woodbury County*, 221 Iowa 732, 734, 266 N.W. 815, 817 (1936).

Grand Jury is no less than a judicial body,[6] which as a "part of the judicial process"[7] for "the determination of guilt or innocence"[8] is charged with conducting a "judicial inquiry"[9] to judge conclusively whether probable cause exists for the trial of a citizen in a criminal case.[10] Since the function of adjudication of probable cause performed by the Grand Jury "forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matter of first importance." See opinion of Mr. Justice Frankfurter for the Court in *United States* v. *Johnson*, 319 U.S. 503, at 507. Because of considerations such as these, "this Court over the past fifty years has adhered to the view that valid grand jury selection is a constitutionally protected right." See opinion of Mr. Justice Clark for the Court

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[6] *Toth* v. *Quarles*, 350 U.S. 11, 16; *Cobbledick* v. *United States*, 309 U.S. 323, 327; *Wilson* v. *United States*, 221 U.S. 361, 377; *United States* v. *Neff*, 212 F(2) 297 (C.C.A. 3, 1954); *Naftzger* v. *United States*, 200 Fed. 494, 497 (C.C.A. 8, 1912); *In re National Window Glass Workers*, 287 Fed. 219 (N.D. Ohio, 1922); *Parsons* v. *Age-Herald Pub. Co.*, 181 Ala. 439, 446, 61 So. 345, 348 (1913); *State* v. *Burney*, 229 Mo. App. 759, 767, 84 S.W. (2) 659, 664 (1935); *Ex Parte Peart*, 5 Cal. App. (2) 469, 473; 43 Pac. (2) 334, 336 (1935).

[7] See *Cobbledick* v. *United States*, 309 U.S. 323, 327.

[8] See *Toth* v. *Quarles*, 350 U.S. 11, 16.

[9] *Cobbledick* v. *United States*, 309 U.S. 323, 327; *Wilson* v. *United States*, 221 U.S. 361, 377; *Hale* v. *Henkel*, 201 U.S. 43, 66; *Beavers* v. *Henkel*, 194 U.S. 73, 84; *United States* v. *Neff*, 212 F(2) 297, 301 (C.C.A. 3, 1954).

[10] *Ex Parte United States*, 287 U.S. 241, 250; *Blair* v. *United States*, 250 U.S. 273, 282; *Hendricks* v. *United States*, 223 U.S. 178, 184; *Beavers* v. *Henkel*, 194 U.S. 73, 84; *Ex Parte Bain*, 121 U.S. 1, 12.

in *Reece* v. *Georgia*, 350 U.S. 85, 87. A Grand Juror has always been subject to disqualification in the Federal Courts,[11] and in State Courts, too.[12]

And the Grand Juror, no less than his twin, the Petit Juror, to whom he is generally assimilated,[13] is required

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[11] *Crowley* v. *United States*, 194 U.S. 461; *United States* v. *Hammond*, 26 Fed. Cas. 99 (C.C.D. La., 1875); Rule 6(b) of the Federal Rules of Criminal Procedure; see *United States* v. *Gale*, 109 U.S. 65, 69-70; *Keizo* v. *Henry*, 211 U.S. 146, 149; and 48 Stat. 649.

[12] *State* v. *Barkley*, 198 N.C. 349, 151 S.E. 733 (1930); *State* v. *Rector*, 158 S.C. 212, 155 S.E. 385 (1930); *State* v. *Soileau*, 173 La. 531, 138 So. 92 (1931); see *Gibbs & Stanton* v. *State*, 45 N.J.L. 379, 382, aff'd. 46 N.J.L. 353 (1884); *State* v. *Anderson*, 166 Atl. 662, 664 (Gen. Sess., Del., 1933).

[13] The Grand Juror decides probable cause with respect to the same issues on which the Petit Juror decides guilt. The federal statutes provide but one set of statutory qualifications (28 U.S.C. Secs. 1861 ff.), and one method of selection from a common list (28 U.S.C. Sec. 1864; D. C. Code, Title 11, Secs. 1401 ff.) for Grand Juror and Petit Juror alike. A majority of the States do the same. See Wayne L. Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 231. "Statutes covering jurors," without specification of whether grand or petit, are held to apply to grand jurors as well as petit jurors. *Clawson* v. *United States*, 114 U.S. 477; *Williams* v. *United States*, 275 Fed. 129 (C.C.A. 9, 1921); *Spencer* v. *United States*, 169 Fed. 562 (C.C.A. 8, 1909). "Principles which forbid discrimination in the selection of petit juries also govern the selection of grand juries." See *Pierre* v. *Louisiana*, 306 U.S. 354, 362. Early in our history, Chief Justice Marshall equated grand jurors to petit jurors on the matter of grounds for challenge. 1 *Burr's Trial*, 38. And not long ago, it was stated that "in a particular case Government employees serving as Grand or Petit Jurors might be barred for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors." See *United States* v. *Emspak*, 95 F. Supp. 1010, 1012 (D.C.D.C., 1951), aff'd. 203 F (2) 54 (C.C.A.D.C., 1952), rev'd. on other grounds, 349 U.S. 190.

to be impartial. The Grand Juror is so pledged. See the opinion of Mr. Justice Black for the Court in *Costello* v. *United States*, 350 U.S. 359, 362; Wayne L. Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 116-118 (1931). This Court has noted the "right to a fair and impartial grand jury" (*Cassell* v. *Texas*, 339 U.S. 282, 298), and in specifying the requirements of a valid indictment insists upon a "nonbiased grand jury" (*Lawn* v. *United States*, 355 U.S. 339, 349) or "unbiased grand jury" (*Costello* v. *United States*, 350 U.S. 359, 363). The decisions invalidating convictions on indictments by grand juries from which negroes,[14] or women,[15] have been excluded are surely based upon "assuring a diffused impartiality." See *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 227 (opinion of Mr. Justice Frankfurter dissenting but not on this point); *Cassell* v. *Texas*, 339 U.S. 282, 287; and *Strauder* v. *West Virginia*, 100 U.S. 303, 309. In the federal courts, at least, there has never been any substantial doubt that grand jurors are required to be impartial. See *Strauder* v. *West Virginia*, 100 U.S. 303, 309 (Reason given for reversal of conviction where Negroes were excluded from grand jury was that "prejudices often exist against particular classes in the community, which sway the judgment of jurors."); *Ex Parte Bain*, 121 U.S. 1, 11 (The indictment itself is designed to pro-

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[14] *Cassell* v. *Texas*, 339 U.S. 282; *Pierre* v. *Louisiana*, 306 U.S. 354; *Carter* v. *Texas*, 177 U.S. 442; *Strauder* v. *West Virginia*, 100 U.S. 303.

[15] *Ballard* v. *United States*, 329 U.S. 187; *United States* v. *Roemig*, 52 F. Supp. 857 (N.D. Iowa, 1943); and *cf. Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (exclusion of daily wage earners from petit jury).

tect against "unfounded accusations . . . prompted by partisan passion."); *Costello* v. *United States,* 350 U.S. 359, 364 (Mr. Justice Burton in a concurring opinion states: "I assume that the Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment."); *Clawson* v. *United States,* 114 U.S. 477 (Statute providing for exclusion in a bigamy case of all "jurors" believing in bigamy held to apply to grand jurors because grand jurors holding such a belief would be as biased as petit jurors of the same belief); *United States* v. *Nunan,* 236 F(2) 576, 593 (C.C.A. 2, 1956), cert. den. 353 U.S. 912 (Refusal of grand jurors to be intimidated by "legislative sound and fury" commended); *United States* v. *Remington,* 191 F(2) 246, 252 (C.C.A. 2, 1951) (Biased grand jury foreman might exercise undue influence requiring quashing of indictment); *United States* v. *Stein,* 140 F. Supp. 761, 767 (S.D.N.Y., 1956) (Indictment to be valid must be returned by unbiased grand jury); *United States* v. *Emspak,* 95 F. Supp. 1010, 1012 (D.C.D.C., 1951), aff'd. 203 F(2) 54 (C.C.A. D.C., 1952), rev'd. on other grounds 349 U.S. 190 (Grand Jurors can be barred for implied bias); *United States* v. *Wells,* 163 Fed. 313, 329 (D.C. Idaho, 1908) ("Unbiased equipoise" is a "principal feature" of the grand jury); *United States* v. *Jones,* 69 Fed. 973, 975 (D.C. Nev., 1895) (Grand Juror can be barred for bias); *United States* v. *Jones,* 31 Fed. 725, 727 (C.C.S.D. Ga., 1887) (One biased grand juror vitiated the indictment): *United States* v. *Benson,* 31 Fed. 896, 900 (C.C.D. Calif., 1887) (Mr. Justice Field states that Federal Courts are not re-

stricted to state disqualifications of grand jurors but can always bar grand jurors biased by intimidation.[16]

In some respects, the achievement of justice in the administration of the criminal law requires impartiality more of the Grand Juror than the Petit Juror. The Grand Juror is more likely to succumb to prejudice, fear, or partiality. Unlike the Petit Juror, he works directly with the prosecutor, and does not have the immediate presence and assistance of an impartial judge and counsel for both sides. Partiality stands out less in his large group of 23. The Petit Juror knows that his own vote is required for conviction. With that individual responsibility, the Petit Juror may succeed in surmounting his fears. Contrariwise, the Grand Juror knows that indictment can be had without his own vote, and that a petit jury will pass upon the case in its turn. In these circumstances, it is all too easy for the frightened Grand Juror to see no compelling reason for "sticking his neck out" by vote

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[16] A number of cases in the state courts are in accord. Indictments are invalidated because of the participation of but one biased grand juror. *The State of Iowa* v. *Gillick*, 7 Iowa 287 (1858); *People* v. *Wintermute*, 1 Dak. 63, 46 N.W. 694 (1875); *People* v. *Landis*, 139 Cal. 426, 73 Pac. 153 (1903); *People* v. *Bright*, 157 Cal. 663, 109 Pac. 33 (1910); *see Patrick* v. *State*, 16 Nebr. 330, 20 N.W. 121 (1884); *Commonwealth* v. *Craig*, 19 Pa. Super. 81 (1902); *State* v. *Richardson*, 149 S.C. 121, 123, 146 S.E. 676, 677 (1928); *People* v. *Cohen*, 357 Ill. 198, 200, 191 N.E. 276, 277 (1934); *In Re Grand Jurors Ass'n., Bronx County, N.Y., Inc.*, 25 N.Y. Supp. (2) 154 (Sp. T. Bronx Co., 1941). In view of the authorities cited in the text and in this footnote, the statement in *United States* v. *Knowles*, 147 F. Supp. 19, 21 (D.C.D.C., 1957), rev'd. on other grounds, 280 F(2) 696 (C.C.A.D.C., 1960) that the basic theory of a grand jury does not require impartiality can only be regarded as a sport.

and argument against an indictment which he personally knows to be unwarranted.

Petitioner was plainly entitled to impartial grand jurors. And further, in order to avoid injury to the jury system by an unseemly use of grand jurors lacking the appearance of impartiality, the grand jurors who indicted petitioner were required to have the appearance of impartiality as well as the substance. See *Ballard* v. *United States,* 329 U.S. 187, 195; *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 225; *Frazier* v. *United States,* 335 U.S. 497, 515-516 (Opinion of Mr. Justice Jackson, dissenting); *Dennis* v. *United States,* 339 U.S. 162, 181-182 (Opinion of Mr. Justice Frankfurter, dissenting); *cf. Tumey* v. *Ohio,* 273 U.S. 510, 532.

2. *The grand jury Petitioner got.*—The indictment here was returned in December 1954 (R. 2). More than seven years of official loyalty-security programs for government employees immediately preceded the indictment (R. 10), and the latest security program was still current (R. 10). The programs received wide publicity in the press, and by the time the grand jury met to adjudicate probable cause for trial in petitioner's case every government employee must have been keenly aware of the existence and operation of such programs (R. 10), including the fact that official investigation was made of "any government employee against whom an accusation is made, however slight, of any indication of sympathy for a communist" (R. 10). The grand jury here knew that petitioner was believed to be a Communist; for his Congressional testimony shows that, and the very questions on which he was indicted all dealt with petitioner's alleged Communist activities (R. 3-4; 9).

In the period 1951-1952, two social psychologists had conducted a study of the impact on government employees in Washington, D. C., of less than six years of loyalty-security programs (R. 12-13). One of these experts, Dr. Marie Jahoda, found that (R. 12):

> . . . Under present conditions there is a great likelihood that many federal employees are not in a position of passing fearless and unbiased judgment on matters in any way concerning loyalty, security or charges of communism. It is my opinion also that many government employees will at present be reluctant to disagree with official accusations that a person was a communist or associated with communists for fear that if they disagreed, they themselves would become suspect and subject to investigation. I am further of the opinion that the fear which was so evident in our interviews is the result not of a bad conscience, but of the present climate of opinion among federal employees which engenders suspicion and fear, regardless of innocence or guilt.

The other expert who collaborated in the study, Dr. Stuart W. Cook, Head of the Department of Psychology, Graduate School of Arts and Science, New York University, found that (R. 13):

> . . . under present conditions in Washington, D. C., such employees are not sufficiently free from the fear of personal consequences to pass unbiased judgment on charges involving loyalty, security or communism. Such employees, I believe, are unable to free themselves of the possibility that if they disagree with official accusations that a person is a communist or is associated with communists, this will become a part of their own records and eventually play a role in an investigation of their own loyalty and security.

The foregoing findings were proven by the affidavits of the experts concerned (R. 9-13). The Government passed up cross-examination; and offered no evidence in contravention (R. 15).

Of the twenty-three members of the grand jury which indicted petitioner, thirteen were government employees, including the Foreman who was an employee of the Department of State and two employees of the District of Columbia (R. 5-6).

Nevertheless, the District Court refused to dismiss the indictment (R. 15); and the Court of Appeals affirmed petitioner's conviction (R. 167).

3. ***The precise contention we make here.***—We accept the decisions in *Frazier* v. *United States*, 335 U.S. 497, and *United States* v. *Wood*, 299 U.S. 119. We do not urge that the government employee is to be barred from jury participation in criminal cases in the District of Columbia regardless of the nature or circumstances of his employment and their relation to the matters involved in a particular prosecution. Yet, in evaluating the seriousness for petitioner and jury system alike of the contention we do make, the Court should recall that such barring of the Government employee was once held essential for impartiality and the appearance of impartiality in all criminal prosecutions in the District of Columbia. See *Crawford* v. *United States*, 212 U.S. 183.

We accept the majority decision in *Dennis* v. *United States*, 339 U.S. 162. Accordingly we do not urge that *three months* of having an official loyalty order with "administrative implementation . . . yet to come," as was the case in *Dennis* (339 U.S. at p. 169), would so affect government employees in the District of Colum-

bia as to prejudice the fact or the appearance of their impartiality as jurors in criminal cases. The facts in petitioner's case are far more grave. Yet, in connection with *Dennis*, too, we would respectfully ask the Court to observe that the meager facts in *Dennis* were believed by two dissenting Justices to suffice for the barring of Government employees as jurors. See *Dennis* v. *United States*, 339 U.S. 162 at 175 ff. and 181 ff. (Dissenting opinions of Mr. Justice Black and Mr. Justice Frankfurter).

We are not concerned here with grand juries that sit at any place other than Washington, D. C., or that consider cases not involving alleged communists. Neither are we concerned with any Washington, D. C., grand jury that sat in 1947 (as in *Dennis*) or that sits now or in the future. The grand jury which indicted petitioner, an alleged Communist, sat at Washington, D. C., in 1954 (R. 2). As to that grand jury, we urge on the facts we have shown (pp. 29-31, *supra*), that the intimidating impact of seven years of operation of loyalty-security programs on government employees as a class was more than sufficient to bar the thirteen government employees from participation in its deliberations.

Over eighty years ago, the Court in *Strauder* v. *West Virginia*, 100 U.S. 303, 309, stated:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and, which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

Uncontradicted on the record here is the fact of prejudice in the Washington community of government em-

ployees against the hated class of communists which, allegedly, included petitioner.

The Court in *Frazier* carefully left the government employee ineligible for jury participation when a showing of "actual bias" is made. And the Court carefully defined "actual bias" to include "not only prejudice in the subjective sense but also such as might be thought implicitly to arise in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise." See *Frazier* v. *United States*, 335 U.S. 497, 510n. In *Dennis*, the majority opinion noted that no decision was being made against a showing of prejudice and fear from a loyalty order in bar of the government employee as a juror in a communist case; and Mr. Justice Reid who concurred did so on his understanding of the majority opinion to hold that government employees are to be barred "for implied bias when circumstances are properly brought to the Court's attention which convince the Court that Government employees would not be suitable jurors in a particular case." See *Dennis* v. *United States*, 339 U.S. 162, 168, 171-172, 172-173. The Court in *Morford* v. *United States*, 339 U.S. 258, reversed a conviction in a communist case for failure to allow a *voir dire* of government employees on the subject of the influence on government employees of the Truman loyalty order.[17]

Petitioner's case is just such a case as *Frazier* and *Dennis* envisaged. The uncontroverted showing we

[17] That *Frazier*, *Dennis*, and *Morford* were concerned with petit jurors rather than grand jurors is immaterial on a question of impartiality. See paragraph 1, *supra*, pp. 23-29.

have already made of "fear" among government employees "regardless of innocence or guilt" in a communist case (R. 12) is the showing for which opportunity was afforded by reversal of the conviction in *Morford*—except that our proof by at least two impartial experts who conducted a study of government employees is more seemly and rational than direct questioning of jurors.[18]

The Court invalidates convictions where jurors acted under colorful conditions of intimidation because of hostile public sentiment and mob violence. *Moore* v. *Dempsey*, 261 U.S. 86; see *Frank* v. *Mangum*, 237 U.S. 309, 335. Here the exposure of government employees to seven years of loyalty-security programs was more depressing than colorful, and more subtly baneful than violent. *Cf. Irvin* v. *Dowd*, 366 U.S. 717. We have proven the inevitable intimidation which resulted. Had we not made that proof, we might well have asked the Court, whose members live in the Washington metropolitan area, to take notice of intimidation that was certainly notorious by 1954. As early as 1948, Mr. Justice Jackson, a veteran in government employment, already had a prophetic insight into such intimidation:

> At the same time that it [the Government] made its plea to them [government-employee jurors] to convict, it had the upper hand of every one of them in matters such as pay and promotion. Of late years, the Government is using its power as never before to pry into their lives and thoughts upon

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[18] See *Dennis* v. *United States*, 339 U.S. 162, 182-183 (Dissenting opinion of Mr. Justice Frankfurter); *United States* v. *Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951); *People* v. *Landis*, 139 Cal. 426, 73 Pac. 153 (1903).

> the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secu. as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to "... crook the pregnant hinges of the knee where thrift may follow fawning." (*Frazier* v. *United States*, 335 U.S. 497, 515)

With the passage of but two years, two Justices of this Court found such intimidation of government employees already so notorious as to warrant judicial notice:

> ... Only naivete could be unmindful of the force of the considerations set forth by Mr. Justice Black, and known of all men. There is a pervasiveness of atmosphere in Washington whereby forces are released in relation to jurors who may be deemed supporters of an accused under a cloud of disloyalty that are emotionally different from those which come into play in relation to jurors dealing with offenses which in their implications do not

> touch the security of the nation. Considering the situation in which men of power and influence find themselves through such alleged associations, it is asking more of human nature in ordinary government employees than history warrants to ask them to exercise that "uncommon portion of fortitude" which the Founders of this nation thought judges could exercise only if given a life tenure. (*Dennis* v. *United States,* 339 U.S. 162, 175, 182)

And see *Quinn* v. *United States,* 203 F(2) 20, 26 (C.C.A.D.C., 1952), rev'd 349 U.S. 155 (Opinion by Judge Bazelon, dissenting for himself and Judge Edgerton).

If an increasingly oppressive and intimidating atmosphere was so notorious by 1950 as to warrant judicial notice by Justices of the Court, then surely our proof of the fact of intimidation in 1954 is ample. In *Remmer* v. *United States,* 347 U.S. 227, 229, the Court laid down the requirement that "a juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder." *Cf. In re Grand Jurors Ass'n, Bronx County, N. Y., Inc.,* 25 N.Y. Supp. (2) 154 (Sp. T. Bronx Co. 1941). Here our proof (R. 9-13) shows the government employee to have been borne down by the whole weight of a suspicious Congress, a frightened Executive Branch, an oppressive and pervasive fear, and consequent worry as to family and family support—the very things that move men most.

"Diffused impartiality" befits a grand jury. Petitioner got a concentration of partiality, and certainly the appearance of it. The conviction of petitioner denies due process of law; for the procedure followed in this case offered every government employee on the

grand jury "a possible temptation . . . to forget the burden of proof required . . . or . . . not to hold the balance nice, clear and true between the State and the accused . . ." See *Tumey* v. *Ohio*, 273 U.S. 510, 532.

The judicial functions which the Grand Jury had here to perform were not *pro forma*. The Grand Jury had to adjudicate the existence or absence of probable cause on two issues—a pertinent subject of inquiry, amid a welter of conflicting possibilities; and a legislative purpose in the demand for petitioner's testimony. Those issues remain difficult of fair solution even at this late stage of the case. See Points III and VI, pp. 51 and 64, *infra*. A third issue before the Grand Jury was whether petitioner's answers to the questions declined were demanded despite his objections (see *Quinn* v. *United States*, 349 U.S. 155). At trial, the District Court directed a verdict on most of the Counts for lack of such demand (R. 153). But the grand jury's erroneous finding of such demand left the issue in the case to burden the preparation of petitioner's defense. A grand jury less subject to intimidation might have insisted upon specification in the indictment of the subject of inquiry for which it found probable cause, and saved petitioner the bewilderment on this point which plagued his defense throughout trial. See Point II, *infra*, p. 41. So, although we need make no showing of prejudice,[19] petitioner suffered serious prejudice by the violation of his right to impartial grand jurors.

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[19] *Cassell* v. *Texas*, 339 U.S. 282; *Ballard* v. *United States*, 329 U.S. 187, 195; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225; *Ex Parte Bain*, 121 U.S. 1, 9; *United States* v. *Roemig*, 52 F. Supp. 857, 862 (N.D. Iowa, 1943); *United States* v. *Edgerton*, 80 Fed. 374 (D.C. Mont., 1897).

4. *The Remedy for Violation of Petitioner's right to impartial grand jurors.*—A biased grand juror does more than just vote. He participates in the give and take of grand jury deliberations. In any deliberative group where all but one are impartial, the one who is secretly biased has a tremendous advantage in getting his fellows to reach the result which he is determined to achieve regardless of every consideration. His fellows but weigh while the biased one drives toward a predetermined goal. So it is that a considerable body of authority supports invalidation of an indictment because of one biased grand juror.[20] And the law is so solicitous of avoiding any possibility of undue influence on the grand jury that the presence of any unauthorized person invalidates an indictment.[21] Had there been but one government employee on the grand jury here, it would have been a nice question whether the indictment should be invalidated on that account, or whether the conviction should be reversed for ascertainment of how many jurors, *not* government em-

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[20] *United States* v. *Gale*, 109 U.S. 65, 69-70; *United States* v. *Jones*, 31 Fed. 725, 727 (C.C.S.D. Ga., 1887); and see the State Court cases cited, *supra*, p. 28 n. 16.

[21] *Lathan* v. *United States*, 226 Fed. 420 (C.C.A. 5, 1915); *United States* v. *Wells*, 163 Fed. 313 (D.C. Idaho, 1908); *United States* v. *Edgerton*, 80 Fed. 374 (D.C. Mont., 1897); *Coblentz* v. *State*, 164 Md. 558, 166 Atl. 45 (1933); *People* v. *Munson*, 319 Ill. 596, 150 N.E. 280 (1926); *Collier* v. *State*, 104 Miss. 602, 61 So. 689 (1913); *Maley* v. *District Court of Woodbury County*, 221 Iowa 732, 266 N.W. 815 (1936) (by statute); *Nixon* v. *State*, 68 Ala. 535 (1881) (by statute).

ployees, necessarily concurred in the indictment.[22] However, there was a majority of 13 government em-

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[22] Rule 6(b)(2) of the Federal Rules of Criminal Procedure in providing for a motion to dismiss an indictment based "on the lack of legal qualifications of an individual juror" goes on to require that an indictment shall not be dismissed if "12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." If we had but one government employee on the grand jury here, it would be an open question whether this provision as to the concurrence of 12 "legally qualified" jurors applies to a case of bias as distinguished from the lack of legal qualifications provided by statute, *i.e.*, citizenship, age, residence, non-conviction for serious crime, literacy and mental and physical competence. See 28 U.S.C. Sec. 1861.

The Rule 6(b)(2) provision on the concurrence of 12 legally qualified jurors derives from Section 2 of Public Law 180, Act of April 30, 1934, Ch. 170, 48 Stat. 649. The draftsmen of Rule 6(b)(2) apparently intended no change. See 18 U.S.C. (1946 ed.), Sec. 554(a). But the legislative reports on Public Law 180 supply no light on the problem of applicability to a case of bias. See H. Rept. 707, and S. Rept. 585 on H.R. 7748, 73rd Cong., 2nd Sess. There was no debate in the Senate. And the debate of a few minutes in the House looks in both directions; but darkly. 78 Cong. Rec. 2777-2778. A few dicta merely assume applicability of Rule 6(b)(2) to a bias case. See *United States* v. *Thompson*, 144 F(2) 604, 606 (C.C.A. 2, 1944); *Castle* v. *United States*, 238 F(2) 131, 136 (C.C.A. 8, 1956); *United States* v. *Fujmoto*, 102 F. Supp. 890, 896 (D.C. Hawaii, 1952); *United States* v. *Adams*, 3 F.R.D. 396, 405-406 (S.D.N.Y., 1944). However, the opinions in *United States* v. *Knowles*, 147 F. Supp. 19, 20 (D.C.D.C., 1957) and *United States* v. *Remington*, 191 F(2) 246, 252 (C.C.A. 2, 1951) proceed on the assumed premise of non-applicability of Rule 6(b)(2) to a case of bias. Finally, if the proper interpretation of Rule 6(b)(2) were involved here, the cases cited in footnotes 6 and 20, *supra*, would indicate strongly that Congress in passing Public Law 180 to alleviate invalidation of indictments for technical defects did not mean in such ambiguous fashion to change the law as to deprivation of fundamental rights to impartial grand jurors who are free of the possibility of undue influence.

ployees[23] on the grand jury which indicted Petitioner. The District Court, accordingly, should have dismissed the indictment. Petitioner's conviction should be reversed now for that purpose. We think that plain enough in the light of the Court's decisions and the history of a judicial process that ever seeks fairness, particularly in the criminal law.

Yet, if we be wrong on this, Petitioner was unquestionably entitled in May of 1956 to the minimum alternative he requested of a hearing to determine the existence of actual bias in the thirteen grand jurors who were government employees. *Morford* v. *United States*, 339 U.S. 258; *United States* v. *Foster*, 83 F. Supp. 197 (S.D.N.Y., 1949); see *United States* v. *Emspak*, 95 F. Supp. 1010, 1012 (D.C.D.C., 1951). Reversal in order to require such a hearing in 1961, or 1962, would not remedy the deprivation of Petitioner's right to a hearing in 1956. Happily for the government employee the Washington of 1961 is not the Washington of 1956; for in the years since 1956 there

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[23] Perhaps it is unnecessary to state that on the issue here presented no rational distinction can be drawn between the eleven government employees who worked for the federal government and the two government employees who worked for the District of Columbia. All were subject to the Federal Congress, and to appointees of the President. The District of Columbia Government and the Federal Government both employ on the basis of Standard Form 57, "Application for Federal Employment," which includes questions relating to considerations of loyalty and security. The Veterans Preference Act applies alike to employees in each government. Six departments of the District government are by statute directly under the Civil Service Commission. Thus, the personnel policies and forms of the Federal and District governments are practically identical; and identical are their impact upon the employees of the two governments, except that District employees in 1954 were not formally assured of the meager protection of federal loyalty-security orders.

has been increasing freedom from oppression. To extract the evidences of fear from a grand juror who is then in fear is difficult enough. To extract such admissions years after he was frightened would hardly be possible. Shame inhibits self-discovery. The friendly presence of the prosecutor lends welcome support to the suppression of hateful memories of shabby grand jury action. When the battle is over, all men were brave. It is a commonplace that totalitarian regimes have been in power for decades and have vanished without leaving many who can admit supporting them. For these reasons, we respectfully suggest that the remedy today for failure to accord a hearing in 1956 must, in fairness, be dismissal of the indictment. So the Court may find it unnecessary to decide whether Petitioner in 1956 was entitled to dismissal of the indictment because of implied bias or to a hearing for determination of actual bias.

II. The Conviction Should Be Reversed Because the Subject Under Inquiry and the Pertinence of the Questions Thereto Were Not Particularized in the Indictment.

The indictment merely used the words of the statute in charging that the questions which Petitioner refused to answer "were pertinent to the question then under inquiry." (R. 2) Our contention is that the indictment's use of such generic language without further particularization of those elements of the charged crime violated petitioner's rights under the Fifth and Sixth Amendments, and under Rule 7(c) of the Federal Rules of Criminal Procedure.[24]

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[24] The same contention was presented as a question in Petition for Certiorari in *Braden* v. *United States*, Oct. Term, 1960, No. 54, 365 U.S. 431. However, Petitioner in that case did not brief the point, and it was not decided.

To avoid confusion between the questions which Petitioner declined to answer and the "question under inquiry" we use the

When, as is the case with Section 192, a statute defines an offense in generic terms, "it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars." See *United States* v. *Cruikshank*, 92 U.S. 542, 558; *United States* v. *Simmons*, 96 U.S. 360, 362; *United States* v. *Hess*, 124 U.S. 483, 487; and *Keck* v. *United States*, 172 U.S. 434, 437. In these cases, extensively cited and followed in the federal courts,[25] the Court voided indictments for the very reason that an element of the offense was charged in statutory generic terms without specification of particulars—as is the case here. Such generalization in the charging of an element of the offense was held to violate the right of an accused, conferred upon him by the Sixth Amendment, to "be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense." See *United States* v. *Simmons*, 96 U.S. 360, 362; *Burton* v.

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term "subject under inquiry," instead of "question under inquiry."

If, as we urge, the indictment was void for failure to specify the subject under inquiry, there is no need to consider whether the indictment would have to state some connective reasoning between the questions and the undisclosed subject of inquiry to show pertinence. Conversely, if the subject of inquiry need not be specified in the indictment, it follows that the pertinence of the questions need not be particularized and, indeed, cannot be. For these reasons, we simplify the argument made in the text by confining it to the lack in the indictment of a specified subject of inquiry.

[25] *United States* v. *Goldberg*, 225 F(2) 180, 184 (C.C.A. 8, 1955); *White* v. *United States*, 67 F(2) 71, 73 (C.C.A. 10, 1933); *United States* v. *Geare*, 293 Fed. 997, 1000 (App. D.C., 1923); *Brenner* v. *United States*, 287 Fed. 636 (C.C.A. 2, 1922); *Knauer* v. *United States*, 237 Fed. 8, 13 (C.C.A. 8, 1916); *Martin* v. *United States*, 168 Fed. 198, 205 (C.C.A. 8, 1909); *United States* v. *Bop*, 230 Fed. 723, 726 (N.D. Cal., 1916).

United States, 202 U.S. 344, 372; *Bartell* v. *United States*, 227 U.S. 427, 431; *Hagner* v. *United States*, 285 U.S. 427, 431.[26]

The *Simmons*, *Hess* and *Keck* indictments were held void by this Court, and many indictments are held void in the lower federal courts,[27] for failure to descend from generic statutory terms to *particulars that would lie within the knowledge of a guilty accused*. Nevertheless, in those cases the presumption of innocence secured the constitutional right to indictment particulars of guilty and innocent alike. See *Lynch* v. *United*

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[26] In the lower federal courts, the purpose of this Constitutional right of an accused to particularity in an indictment is variously, but strongly stated. The indictment must so clearly inform the accused of the crime charged "that he may prepare all defenses within his power to offer," *Burnett* v. *United States*, 222 F(2) 426, 428 (C.C.A. 6, 1955); that he "not be taken by surprise by the evidence offered at the trial," *Wolpa* v. *United States*, 86 F(2) 35, 38 (C.C.A. 8, 1936), cert. den. 299 U.S. 611; and that he be told "all he needs to know for his defense," *Davis* v. *United States*, 49 F(2) 267 (C.C.A. 4, 1931), cert. den. 283 U.S. 859; *Blum* v. *United States*, 46 F(2) 850, 851 (C.C.A. 6, 1931); *Martin* v. *United States*, 299 Fed. 287, 288 (C.C.A. 4, 1924).

[27] *United States* v. *Strauss*, 285 F(2) 953 (C.C.A. 5, 1960); *White* v. *United States*, 67 F(2) 71 (C.C.A. 10, 1933); *Reimer-Gross Co.* v. *United States*, 20 F(2) 36 (C.C.A. 6, 1927); *Turk* v. *United States*, 20 F(2) 129 (C.C.A. 8, 1927); *Jarl* v. *United States*, 19 F(2) 891 (C.C.A. 8, 1927); *Boykin* v. *United States*, 11 F(2) 484 (C.C.A. 5, 1926); *Hartson* v. *United States*, 14 F(2) 561 (C.C.A. 2, 1926); *Lynch* v. *United States*, 10 F(2) 947 (C.C.A. 8, 1925); *Carpenter* v. *United States*, 1 F(2) 314 (C.C.A. 8, 1924); *Fontana* v. *United States*, 262 Fed. 283 (C.C.A. 8, 1919); *Martin* v. *United States*, 168 Fed. 198 (C.C.A. 8, 1909); *United States* v. *Fuselier*, 46 F(2) 568 (W.D. La., 1930); *United States* v. *Burns*, 54 Fed. 351 (C.C.D. W. Vir., 1893); *United States* v. *Goggin*, 1 Fed. 49 (C.C.D. Wisc., 1880); *cf. Patterson* v. *United States*, 222 Fed. 599, cert. den. 238 U.S. 635; *United States* v. *Bop*, 230 Fed. 723 (N.D. Cal., 1916).

States, 10 F(2) 947, 949 (C.C.A. 8, 1925); and *Fontana* v. *United States,* 262 Fed. 283, 286 (C.C.A. 8, 1919).

But the "subject of inquiry" is an elusive thing. The very term, itself, has its semantic difficulties. Cf. the discussion, *infra* at p. 64. The subject of inquiry in cases like this one is not susceptible of ascertainment from the House Resolution which empowered the House Committee on Unamerican Activities. *Watkins* v. *United States,* 354 U.S. 178, 209-211. It cannot properly be derived from sources not known to the accused at the time he testified. *Watkins,* at pp. 214-215, 217. It may or may not be susceptible of ascertainment from a number of different sources. *Watkins* at pp. 209-214; *Barrenblatt* v. *United States,* 360 U.S. 109 at pp. 124-125. Given the same sources, Courts disagree on what it is in a particular case. Compare the opinions of the Court below in *Watkins* v. *United States,* 233 F(2) 681, and *Sacher* v. *United States,* 252 F(2) 828, with the opinions of this Court in the same cases, 354 U.S. 178, and 356 U.S. 576. And members of the same Court, given the same materials, can and do disagree on the subject of inquiry. Compare the majority and dissenting opinions in *Deutsch* v. *United States,* 367 U.S. 456, 472, 475. Usually difficult of certain ascertainment in any case, the fact of the subject of inquiry was surely not in petitioner's possession at the time of indictment—entirely apart from any presumption of innocence. We must assume that the Grand Jury had a subject in mind to which it thought the indictment questions to be probably relevant. Had it been revealed in the indictment, petitioner could have prepared his defenses to *the* subject of inquiry claimed. Instead, he was left to grope at trial among

the many different possible subjects on which the prosecution offered proofs;[29] and some of those could not possibly have been imagined by him in advance of trial. See pp. 12-16, *supra*. Here, then, there was extraordinary reason for requiring specification in the indictment of the subject of inquiry; for, unlike most cases in which the Sixth Amendment has been applied to invalidate indictments couched in general, statutory terms, petitioner, himself, had no knowledge of the subject of inquiry, whether or not he was presumed to be innocent. Indeed, in this case, it remains an assumption to this day that anyone rightly knew or knows the subject under inquiry when petitioner testified. The Chairman of the Subcommittee before which petitioner appeared meandered extensively (R. 38-42); but not more so than the Subcommittee's counsel (R. 35) or the prosecutor at trial (R. 43ff). The Grand Jury (R. 2), the District Court (R. 132; 138; 156), and the Court of Appeals (R. 166-167) all failed to specify any subject under inquiry. And yet, a subject under inquiry, although it is hard to come by, is stated easily and in a few words, once it is ascertained. See, e.g. *Barrenblatt* v. *United States*, 360 U.S. 109 (ascertained subject of inquiry: Communist infiltration into education); (*Wilkinson* v. *United States*, 365 U.S. 399 (ascertained subject of inquiry: Communist infiltration into basic Southern industry).

The failure of the indictment to specify the subject under inquiry could not be remedied by a bill of par-

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[29] Cf. *Johnson* v. *United States*, 294 Fed. 758 (C.C.A. 9, 1924); and *United States* v. *Burns*, 54 Fed. 351 (C.C.D. W. Vir., 1893).

ticulars.[29] *White* v. *United States*, 67 F(2) 71 (C.C.A. 10, 1933); *Jarl* v. *United States*, 19 F(2) 891 (C.C.A. 8, 1927); *Naftzger* v. *United States*, 200 Fed. 494 (C.C.A. 8, 1912); *cf. Lanzetta* v. *New Jersey*, 306 U.S. 451, 453. If he was to be charged at all, it was petitioners's right to be indicted by the Grand Jury. 2 U.S.C. Sec. 194; Constitution, Art. V. Neither the prosecutor, nor any of the Courts passing on this case could amend the indictment. That is well settled.[30]

Hence, if the Grand Jury had specified "A" as the subject of inquiry, neither "B" nor "C" nor "D" etc. could validly serve as the subject of inquiry at any stage of petitioner's case. But here where the Grand Jury has made no specification of the subject of inquiry, it is true, for aught that the Court can discern, that the Grand Jury indicted on the basis of subject of inquiry "A," the trial judge convicted on subject of inquiry "B," and the Court of Appeals affirmed on subject of inquiry "C." This is a forbidden process of amendment of the indictment, far worse than any condemned by the controlling decisions with respect to amendments of indictments on which we rely. Here,

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[29] If, in fact, the prosecutor here knew for what subject of inquiry the Grand Jury found probable cause, then there is all the more reason for requiring its specification in the indictment. The fair administration of criminal justice seeks justice. The Government should not want a conviction obtained by concealment which deprives the accused of a full and fair opportunity to prepare his defense. See *White* v. *United States*, 67 F(2) 71, 77 (C.C.A. 10, 1933); *United States* v. *Burns*, 54 Fed. 351, 359 (C.C.D. W. Vir., 1893).

[30] *Stirone* v. *United States*, 361 U.S. 212; *United States* v. *Norris*, 281 U.S. 619; *Ex Parte Bain*, 121 U.S. 1; *Dodge* v. *United States*, 258 Fed. 300 (C.C.A. 2, 1919), cert. den. 250 U.S. 660; *Stewart* v. *United States*, 12 F(2) 524 (C.C.A. 9, 1926); *Naftzger* v. *United States*, 200 Fed. 494 (C.C.A. 8, 1922).

as to an essential element of the crime charged, the Grand Jury left a blank which anyone—prosecutor, trial judge, or reviewing Court—could fill in differently at will, and for all we know, did. Petitioner's conviction must be reversed, or the well-settled rule against amendments to indictments is made meaningless. More fundamentally, the fairness required by the Due Process Clause surely invalidates the procedures by which petitioner still stands convicted; for here, unless his conviction is set aside, it will always remain likely that Petitioner was, in effect, charged by the Grand Jury with one crime, convicted by the trial judge of another, and found guilty on review of still a third. *Cf. Kotteakos v. United States,* 328 U.S. 750; *Cole v. Arkansas,* 333 U.S. 196; *United States* v. *Klass,* 166 F(2) 373 (C.C.A. 3, 1958); *Jarl* v. *United States,* 19 F(2) 891, 892 (C.C.A. 8, 1927); *Johnson* v. *United States,* 294 Fed. 753 (C.C.A. 9, 1924).

However, it remains most likely that petitioner was indicted for no crime at all. The indictment and trial in this case were before this Court's decision in *Watkins.* In the pre-*Watkins* days, the Government was erroneously asserting the subject of inquiry to be as broad as the House Resolution which empowered the House Committee on Un-American Activities. Such was the position of the Government at trial in this case. See R. 43; see also *United States* v. *Lorch,* Cr. No. 3185 (S.D. Ohio, Nov. 27, 1957, unreported); and *cf. Shelton* v. *United States,* No. 9, United States Supreme Court October Term, 1961, R. 17-18; 20; 40; *Knowles* v. *United States,* 230 F(2) 696, 700 (C.C.D.C., 1960); and *United States* v. *Peck,* 154 F. Supp. 603, 610-11, fn. 25 (D.C.D.C., 1957). The Grand Jury's position can be reasonably assumed to have been the same. So,

in all likelihood, petitioner was put upon his trial upon Grand Jury findings as to probable cause that constituted no offense, since, under this Court's decision in *Watkins*, the House Resolution which empowered the Committee cannot serve as a subject of inquiry.

Because the indictment specified no subject of inquiry, we have been compelled in this discussion to speak of the probability rather than the fact of indictment for no crime, or indictment and conviction for different crimes. And the Court here is under the same compulsion. In plain and simple terms the Court must reverse Petitioner's conviction; or, in this type of contempt of Congress case where the indictment specifies no subject of inquiry, the Court must abdicate its traditional and paramount function of review in enforcement of Constitutional limitations. Unless the indictment specifies the subject under inquiry, the Court cannot discern whether the Grand Jury found probably cause as to the elements of a punishable offense, or whether, if the Grand Jury did, the petitioner was convicted of that offense. In such circumstances, and they are the very circumstances here, review becomes impossible or constitutes the mere rubber stamping of a conviction, which is the same thing. *Cf. Watkins* v. *United States*, 354 U.S. 178, 214; *Sweezey* v. *New Hampshire*, 354 U.S. 234, 254.

Furthermore, since the questions Petitioner refused to answer were to some extent an invasion of a personal area normally protected by the First Amendment (*Barrenblatt* v. *United States*, 360 U.S. 109, 126), the strict according of Petitioner's Fifth and Sixth Amendment rights with respect to the indictment, and a strict demand for precise procedures that enable this Court's purposeful review, are particularly appro-

priate. The several provisions of the Bill of Rights were not intended to wither away separately in isolation but to reinforce each other in their various and overlapping applications. At least, such is the jurisprudence of which we Americans have been taught, largely by this Court, to be proud.

Finally, if Petitioner's rights under the First, Fifth, and Sixth Amendments are to be balanced against the Government's need to continue with indictments which specify no subject of inquiry, the scales must incline heavily on Petitioner's side. There is so little to put on the Government's side. A subject of inquiry is difficult to ascertain. But that is no excuse for the Grand Jury's failure to state one. Rather, since it is difficult to ascertain, it is only the statement of it which can insure that probable cause was found for this element of pertinence. Once the subject of inquiry is ascertained, there is no burden involved in stating it. Only a few words are needed. See p. 45, *supra;* and see *United States* v. *Lorch,* Cr. No. 3185 (S.D. Ohio, Nov. 27, 1957, unreported). The *Lorch* case arose from the same series of hearings as this one; but the indictment there simply stated in a few words that the subject under inquiry was "Communist Activities in the Dayton-Yellow Springs area." Indeed, in contempt of Congress cases it was once traditional for the indictment to state the subject under inquiry and the relation of the indictment questions to it, even though such statement was much more complicated than the few words required here. See *Sinclair* v. *United States,* 279 U.S. 263, 285-289; *In re Chapman,* 166 U.S. 661, 663; *cf. Kilbourn* v. *Thompson,* 103 U.S. 168, 170ff.

The Government, it is authoritatively stated, must "plead" pertinence. See *Sinclair* v. *United States*, 279 U.S. 263, 296-297; *Bowers* v. *United States*, 202 F(2) 447, 453 (C.C.A.D.C., 1953). In the light of the considerations we have set forth, the pleading of pertinence must require more than a general statement that the questions were "pertinent to a question then under inquiry" (J.A. 3). See *United States* v. *Lamont*, 236 F(2) 312 (C.C.A. 2, 1956); *United States* v. *Metcalf*, Cr. No. 3052 (S.D. Ohio, Oct. 3, 1955, unreported). Otherwise, the requirement that pertinence must be pleaded would insure only that the Assistant United States Attorney accredited to the Grand Jury has read the statute and quoted it accurately in the indictment. Surely, the Court in *Sinclair* was not concerning itself with requiring that formal ritual. Required pleading in any indictment, and especially where rights under the First, Fifth, and Sixth Amendments are involved, is directed, as we have shown, to assuring: Trial upon the Grand Jury's finding of probable cause for the elements of the crime, and no one else's; a fair opportunity to the accused to know the charge and so prepare his defense; conviction upon a crime charged by the Grand Jury and not some other crime or no crime at all; and preservation of the Appellate Court's opportunity to review. Because the indictment failed to specify a subject under inquiry, none of these is assured here. Petitioner's conviction should be set aside and the indictment dismissed.

III. The Conviction Should Be Reversed Because Petitioner's Testimony Was Demanded to Punish Him for Contempt and Not in Aid of a Legislative Purpose. At a Minimum, Petitioner was Wrongfully Deprived of a Jury Trial on This Issue.

We respectfully ask the Court to reread our Statement at pp. 6-9 for the details (none of them is unimportant) of the evidence at trial pertinent to the largely factual contentions we make here.

Petitioner first testified at Dayton in September, 1954. He was called then only on the theory that he would "cooperate," i.e. answer all questions; for otherwise "in all probability" he would not have been called at all (R. 68). Petitioner's flat refusal on the basis of the First Amendment to answer any questions concerning communism was thoroughly tested at Dayton by a series of specific questions that elicited no change in Petitioner's refusal. Satisfied that Petitioner would not cooperate, Committee Counsel "broke the questioning up" (R. 68) and Petitioner was excused with the announcement that Committee Counsel had no further questions (R. 63). In Petitioner's appearance at Dayton nothing occurred to warrant any hope that if called again in a few weeks and asked the very same questions he would answer them. He was not in any doubt as to the rightness of his position,[21] and had not been misled by any misinformation (cf. *Raley* v. *Ohio*, 360 U.S. 423) or ambiguous order (cf. *Flaxer* v. *United States*, 358 U.S. 147) from the Committee. And, in

[21] Petitioner's refusal was explicitly based on the claim of a First Amendment right. Later, *Barrenblatt*, *Wilkinson*, and *Braden* rejected such a claim. But those cases, this case, and the companion contempt cases now before the Court are all evidences of a widespread belief in such a claim, sincerely and staunchly held by many people at the time of Petitioner's appearances.

the face of the Government's burden of proof in a criminal trial, it cannot be assumed from the fact of no quorum at Dayton that Petitioner (1) knew that a quorum is required; (2) knew what constitutes a quorum; (3) knew that the one member sitting had not been appointed to sit alone, and hence might not be a quorum; and (4) that his refusal to answer was therefore influenced by the absence of a quorum.

At Washington where Petitioner's alleged contempt occurred, the Chairman announced that shortness of time at Dayton had "resulted in the necessity of continuing that hearing by calling several witnesses for further testimony" (R. 67). That false excuse fails to hide the absence of any purpose other than punitive in the Committee's recall of Petitioner; for (1) three witnesses testified at Dayton after Petitioner had testified, including an unscheduled witness permitted to testify on his own request; (2) the other witnesses at Dayton who had relied on the First Amendment were not called to Washington in the hope of answers previously declined, but were indicted for contempt in Dayton where their appearances had, unlike Petitioner's, been before legal quorums; and (3) Petitioner who was the only Dayton witness to rely on the First Amendment in the absence of a legal quorum was the only Dayton witness called for a further appearance at Washington. (p. 8, *supra*)

Nothing occurred in the weeks between September and November to warrant any hope that Petitioner at Washington would answer the questions he had flatly refused to answer at Dayton. But again, the Government's effort at trial to rebut this fact fails to hide the absence of any purpose other than punitive in the Committee's recall of Petitioner. Committee Counsel

testified at the trial. He thought that Petitioner might not claim his First Amendment privilege if called to testify again, because when served with a new subpoena to appear in Washington in November, Petitioner showed a desire to get in touch with a Committee staff member. However, the subpoena was not served until after the making of the decision to subpoena Petitioner for his appearance in Washington; and Petitioner's desire for a conference was to change the stated time for his appearance (p. 8, *supra*).

At the Washington hearing, the Petitioner claimed precisely the same First Amendment privilege against forced disclosure of his "opinions and political beliefs and associations" (R. 66) as he had claimed at Dayton. And he made that claim at the very outset of the hearing in declining to answer the very first question which concerned communism. The reiteration of his position by Petitioner in Washington admittedly ended any remotely possible hope that he "might cooperate with the Committee" and answer questions concerning communism (R. 113). Immediately upon Petitioner's reiterated general refusal at the outset to answer questions concerning communism, the Chairman sought and obtained a specific disclaimer from Petitioner of any reliance on the Fifth Amendment; and, then, Committee counsel, in covering the same field of questioning as at Dayton, went on to ask the sixteen questions which provided the counts in the indictment. It was believed by the Committee and Committee counsel that at Washington they had a legally competent body to receive Petitioner's declinature (pp. 8-9, *supra*).

In the circumstances here presented, the fact that Petitioner was called to Washington for the purpose

of punishing him for contempt and not for a legislative purpose can scarcely be doubted. We do not understand that the trial judge disagreed with the fact. Rather he "felt" that consideration of the issue "was pretty well precluded by some of the decisions" (R. 139). On that theory the trial judge denied our motions for a directed verdict and for judgment of dismissal made at the close of the Government's case and at the close of all of the evidence, and refused to submit the issue to the jury (R. 139, 149, 24-25). The Court of Appeals affirmed (R. 167).

The pertinent decisions do not preclude consideration of the issue of legislative purpose or purpose to punish; rather they require consideration and determination of that issue. The power of the Congressional group which heard Petitioner could extend only to obtaining information in aid of legislation. It had no power to call petitioner to punish him for contempt. *McGrain* v. *Daugherty*, 273 U.S. 135, 178; *Sinclair* v. *United States*, 279 U.S. 263, 295; *Quinn* v. *United States*, 349 U.S. 155, 161; *Watkins* v. *United States*, 354 U.S. 178, 187. In *Sinclair*, the Court expressed doubt as to whether any presumption of regularity attaches that a Congressional Committee is asking questions pertinent to an authorized subject; and the Court stated that the presumption of innocence in a contempt of Congress trial would be stronger. *Sinclair* v. *United States*, *supra*, at p. 296. In any event, so far as there may be a presumption favoring the Government it is plainly a rebuttable one; for in its decisions which deal with a charge of questions for punishment and not in aid of legislation, the Court has carefully reviewed the record before passing on the charge. See *McGrain* v. *Daugherty*, *supra*, at pp. 179-180; *Sinclair* v. *United States*, *supra*, at p. 295; *Wilkinson* v. *United*

States, 365 U.S. 399, 411, 429; *Brown* v. *United States*, 245 F(2) 549 (C.C.A. 8, 1957); see also, *United States* v. *Icardi*, 140 F. Supp. 383 (D.C.D.C., 1956); and *United States* v. *Cross*, 170 F. Supp. 303 (D.C.D.C., 1959).

Here there was no more than "the mere semblance of legislative purpose" (*Watkins*, at p. 198) in compelling the responses by Petitioner for which he was indicted. The semblance of a legislative purpose cannot justify the questions asked of Petitioner. *Watkins* v. *United States*, 354 U.S. 178, 198; *United States* v. *Rumely*, 345 U.S. 41. We readily admit that a Committee may secure a quorum to encourage the getting of information by threatened sanctions of contempt and perjury prosecution. And we do not seek to impugn the motivation of Committee members. But the affirmance of Petitioner's conviction requires the existence of a legislative purpose in demanding answers to the questions for which he was indicted. Here, we have shown by objective and uncontradicted evidence that those questions were asked of Petitioner, not with the legislative purpose of getting answers, but with the forbidden purpose of again getting refusals for punishment by contempt. A directed verdict on the issue was warranted. See *Brown* v. *United States*, *United States* v. *Icardi*, and *United States* v. *Cross*, all *supra;* and cf. *Wilkinson* v. *United States*, 365 U.S. 399, 429 (Dissenting opinion by Mr. Justice Brennan for himself and Mr. Justice Douglas). At a minimum, Petitioner was entitled to a submission to the jury of an issue of fact as to punishment or legislative aid.

IV. The Trial Court, Affirmed by the Court of Appeals, Committed Four Separate Reversible Errors in the Handling of the Question of the Proof of a Legally Constituted Body in That (1) the Issue of the Committee Chairman's Authority to Appoint Subcommittees Was Withheld From the Jury; (2) the Jury Was Informed That the Chairman Had Authority to Appoint Subcommittees By Telephone Alone; (3) a Directed Verdict for Lack of Sufficient Proof of the Appointment of a Subcommittee to Hear Appellant Was Denied; and (4) the Jury Was, in Effect, Instructed That Evidence of the Appointment of a Subcommittee with Mr. Scherer as Chairman Would Suffice as Proof of the Appointment of a Subcommittee With Mr. Clardy as Chairman.

(1) The Government's theory at the trial was that the Chairman of the Committee had appointed as a subcommittee the group which heard Petitioner. The Chairman's authority so to appoint was therefore squarely in issue. All of the evidence on the issue was oral. No documents were introduced. There was testimony that subcommittees could be appointed only by the Committee, itself (R. 134). There was also testimony that in practice the Chairman appointed committees by telephone or personal interview (R. 116), and that he had been authorized to do so by a Committee resolution (never produced) which did not specify the method of appointment to be used (R. 135). The trial judge refused to submit to the jury the question of whether the Chairman had been authorized to appoint subcommittees, and decided as a matter of law that the Chairman was so authorized. (See pp. 10-11, *supra*).

There appears to be no basis for the action of the trial Court on this point. The question was one of disputed fact—either the Chairman had been authorized by the Committee, or he had not. An evaluation of the credibility of the Government witness who testi-

fied on the point was essential—was he biased; was his memory good enough to recall a resolution adopted over three years before his testimony; was he telling the truth. It was not even the type of factual question that rests on interpretation of documents. Yet the trial judge arrogated to himself the determination of credibility, and decided the contested issue of authority to appoint. So Petitioner was deprived of the jury trial to which he was entitled under the Constitution.

(2) Mr. Scherer, one of the group who heard Petitioner, testified that he was appointed to the group by telephone call from the Committee Chairman (R. 87). The trial judge charged the jury that the Committee Chairman could appoint by telephone (R. 158). We claim error.

In our day, we have witnessed many excesses by Congressional committees, sufficient to remind the writer of De Tocqueville's dictum that a number of tyrants are no better than one. Many of the excesses are beyond the corrective powers of the Judiciary. But here we respectfully suggest that this Court can, and should hold that Committee authority to its Chairman to appoint subcommittees without specification of the method must be held in law to be limited to a method of appointment more formal and definitive than a mere telephone call without any record made. Cf. *Ex Parte Frankfeld*, 32 F. Supp. 915, 916 (D.C. D.C., 1940). No less would seem to be required when compulsion upon pain of jailing for contempt is used in a First Amendment area.

(3) There was not sufficient evidence before the jury from which it could find that the Committee Chairman had appointed the group of three with Clardy as Chair-

man which heard Petitioner. A verdict should have been directed.

Committee counsel, Mr. Tavenner, testified that at an executive Committee meeting in August 1954 the Chairman appointed a subcommittee of Congressman Scherer as Chairman with Messrs. Clardy and Walter as members to hold hearings at Dayton at any time prior to three weeks before the election in the beginning of November (R. 115, 119). That testimony of an appointment of a subcommittee with a Chairman different from Clardy, to hold hearings at a city different from Washington, at a time different from the time of Petitioner's appearance at Washington was not relevant in any way to a showing of the appointment of the group of three with Mr. Clardy as Chairman who heard Petitioner.

Congressman Scherer testified on cross-examination that the Committee Chairman had telephoned him during the noon recess before the afternoon of Petitioner's appearance "and said that he was appointing Mr. Clardy and Mr. Walter and myself, as the Chairman of the subcommittee, for the purpose of conducting the hearings that afternoon" (R. 87). This evidence of a subcommittee *with Scherer as Chairman* was also irrelevant to a showing of the appointment of a group of three *with Clardy as Chairman* before whom Petitioner appeared. On redirect, Mr. Scherer, under the guidance of Government counsel, also testified that his appointment by telephone was to a subcommittee of which Clardy was to be Chairman (R. 89).

There was no evidence at all to show the appointment of Messrs. Clardy and Walter to a subcommittee to hear Petitioner. The whole showing of the Government consisted of a guided statement by Scherer of

his appointment to a subcommittee of which Clardy was to be Chairman; his own statement that he, Scherer, was to be chairman of the group to which he was appointed; and no evidence at all of the appointment of Clardy and Walter.

On this lack of an adequate showing, the jury was left to speculate on the appointment of the group of three that heard Petitioner. Fairly considered, a verdict should have been directed.

(4) The trial judge compounded the error of his refusal to direct a verdict by sending the issue of the appointment of the Clardy group to the jury in a manner that left the jury free to find the appointment of the Washington Clardy group from the Tavenner evidence of a Dayton, Scherer subcommittee. In rejection of Petitioner's view that all of Tavenner's evidence should be passed on by the jury (R. 31-32), the only part of Tavenner's appointment testimony which the jury was permitted to hear was that in August the Chairman had appointed a subcommittee with Clardy, Scherer, and Walter as members. The jury was not permitted to hear that the August appointment was of a subcommittee with Scherer and not Clardy as Chairman and for the holding of hearings in Dayton and not Washington (R. 115, 119). This serious error, plain on the face of the record, was made worse by the trial judge's instruction (R. 158) that the jury could find the appointment of the Clardy group in Mr. Tavenner's evidence as to the appointment of a subcommittee in August.[22]

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[22] Respondent, in reliance on *United States* v. *Bryan*, 339 U.S. 323, 330-335 and *Emspak* v. *United States*, 203 F(2) 54, 56, rev'd. on other grounds, 349 U.S. 190, urges that Petitioner cannot raise the lack of a legally-constituted subcommittee for the first time at

Doubtless, the Government will argue that in this heading we concern ourselves with the proof of a mere procedural matter. But the history of the preservation of liberty under law is largely one of the observance of procedural requirements. Beyond that, we offer the suggestion of scarcely anything being more corrosive of the citizen's rights than the judicial acceptance of sloppy Government proof.

V. The Trial Court Should Have Directed a Verdict on All Counts Because the Proof Showed That If Defendant Committed Any Crime of Contempt, the Crime Was Committed When, Before Any of the Questions Alleged in the Indictment, He Made It Clear That He Was Not Going to Answer Any Questions Concerning Communism.

The fact here is clear. At the very outset of his appearance at Washington, and before any of the questions specified in the indictment were asked of him, Petitioner made a complete refusal on answering any questions at all concerning communism. And at least

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trial. Brief for the United States in Opposition, p. 11. Unlike *Bryan*, Petitioner was not convicted of contempt for the purely negative act of "an intentional failure to testify or produce papers." See *Bryan* at p. 329. Petitioner did appear and testify. Unlike *Emspak*, Petitioner appeared at Washington before a three-man group and not a one-man subcommittee that he could then see and object to if he desired. At the time of Petitioner's appearance before the Washington group he could not possibly have observed or known the facts pertaining to its appointment. Cf. *Christoffel* v. *United States*, 338 U.S. 84, 88. Had Petitioner sought then to ascertain those facts he could not have obtained anything more than the Chairman's self-serving declaration of the appointment of the group—unless this Court had plainly decided, as the Government in effect now asks, that any Committee appearance may begin with a hearing on the validity of the Committee's appointment. In reason, the issue is properly raised and decided at the trial; and the cases so indicate. See *United States* v. *Moran*, 194 F(2) 623 (C.C.A. 2, 1952), cert. den. 343 U.S. 965; *Eisler* v. *United States*, 170 F(2) 273, 280 (C.C.A. D.C., 1948); cf. *Christoffel* v. *United States*, 338 U.S. 84.

by that point, if not sooner, the Subcommittee knew that Petitioner would not answer any of the questions alleged in the indictment. (See pp. 8-9, *supra*)

In these circumstances, the complete refusal at the outset to answer questions concerning communism was a contempt, if there be any here. Thereafter, since the Petitioner at the outset had made clear his position of such complete refusal, the subcommittee could not multiply the contempt, and the punishment, by continuing to ask him questions concerning communism and eliciting the same answer to each individual question. The contempt, if any, was total at the outset when he made his statement of general refusal on the whole subject of communism. The refusals thereafter to answer specific questions cannot be considered anything more than expressions of Petitioner's intention to adhere to his earlier statement. As such they were not separately punishable. At most they were only a continuation of the one contempt already committed. *Yates* v. *United States*, 355 U.S. 66; *Bevan* v. *Krieger*, 289 U.S. 459, 465; *Costello* v. *United States*, 198 F(2) 200 (C.C.A. 2, 1952), cert. den. 344 U.S. 874; see *Bowers* v. *United States*, 202 F(2) 447, 451, 92 U.S. App. D.C. 79; cf. *United States* v. *Josephson*, 165 F(2) 82 (C.C.A. 2, 1947), cert. den. 333 U.S. 838; and *Orman* v. *United States*, 207 F(2) 148 (C.C.A. 3, 1953).

The *Costello* case, approved by the Court and accepted by the Government as correct in *Yates* v. *United States*, 355 U.S. 66, 73, is persuasive here. A quotation from that opinion (198 F(2) at p. 204) sets forth the problem there, which is not distinguishable from the problem here, and the Court's decision thereon:

> We are of the opinion that the convictions on Counts Seven, Nine, Ten, and Eleven, must be reversed. Each of those counts dealt with the defend-

> ant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusal to answer specific questions cannot be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable.

The petitioner in *Yates* had refused, as did Petitioner here, to answer questions in a stated area of interrogation, and was then found guilty of contempt on eleven individual questions which followed. There, the Government sought to distinguish *Costello* on the ground that the refusal in *Yates* was not a refusal to answer *any* questions. That attempted distinction was rejected (*Yates* at p. 73), and must be rejected here. *Yates* requires the determination that Petitioner, if he committed any contempt, committed but one contempt in his Washington appearance. Such contempt, under the controlling doctrine of *Yates* on this point, was a single contempt, complete on Petitioner's general refusal to answer questions concerning communism and continuing through the refusals to answer individual questions. But that is not the crime charged against Petitioner in the indictment. The indictment makes no reference to a general refusal to answer questions concerning Communism, and charges sixteen separate contempts. So Petitioner was tried, convicted and

sentenced on the basis of a charge of sixteen contempts. Such conviction was plainly erroneous under *Yates*.

But here, unlike *Yates*, the remedy is not the setting aside of the conviction for the sole purpose of resentencing. *Yates* was a case of criminal contempt committed in the presence of the trial court, and punished summarily. In such a case, as the Court noted in *Yates* at p. 69, it was only necessary under Rule 42(a) of the Federal Rules of Criminal Procedure for the trial judge to certify that he saw or heard the contemptuous conduct, and to recite the facts in his order of contempt. In *Yates*, as the Court specifically observed at p. 70, there was no question as to the form or content of the specifications of the contempt found. So it was possible in *Yates* to affirm the conviction (in effect) on the basis of one continuing contempt. Here, Petitioner had a right to be tried only upon the indictment of the Grand Jury. 2 U.S.C. Sec. 194; Constitution, Art. V. The indictment did not charge Petitioner with one continuing contempt, but alleged sixteen separate contempts which under *Yates* were not punishable offenses. The indictment was also invalid in failing to apprise Petitioner with reasonable certainty, of the nature of the accusation against him, to the end that he might prepare his defense. See the cases cited *supra*, at pp. 42-43. One contempt is not sixteen contempts. Defense preparation and trial of one contempt charge differs from preparation and trial of sixteen contempt charges—and not only in consideration of whether a plea of guilty or *nolo contendere* would be in a defendant's best interest. Cf. p. 37, *supra*. For these reasons, the indictment must be dismissed.

In any event, since indictment, trial, and conviction here were on the invalid basis of sixteen separate of-

fenses, due process does not permit affirmance on an otherwise valid basis of one contempt, for Petitioner was never accorded an opportunity to meet a one contempt charge. See the cases cited at p. 47, *supra*. Petitioner's invalid conviction cannot be validated on review and must be set aside.

VI. The Conviction Should Be Reversed Because It Is Not Supported by the Proof of Pertinence at Trial.

In making its showing of pertinence at the trial, the Government was required to prove a subject under inquiry. *Deutch* v. *United States*, 367 U.S. 456. This the Government failed by far to do.

At the outset of Petitioner's trial, the Government announced its primary position to be that the subject under inquiry was as broad as the powers conferred upon the Committee by H. Res. 5 which established it (R. 43). The Government maintained that position throughout the trial. Its last witness, Committee Counsel, claimed that of the matters entrusted to the full Committee no particular subject was singled out for the hearings at which Petitioner testified (R. 115). This proof cannot support the conviction; for the House resolution which empowers this Committee cannot validly serve as the subject under inquiry. *Watkins* v. *United States*, 354 U.S. 178.

The Government's proof of "special pertinence" touched upon a myriad of separate and distinct possible subjects, which in sum total vaguely comprise the vague, full powers conferred up on the Committee by H. Res. 5. See pp. 12-16, *supra*. The Government offered no proof to connect any of these many possible subjects with the questions on which Petitioner was convicted; and no connection is apparent.

Here the Government does not claim any of these many possible subjects on which it touched at trial as the subject under inquiry when Petitioner testified. Instead it is claimed that the subject under inquiry was "Communist activity at Antioch College." Brief for the United States in Opposition, p. 10. No such contention, or proof of such contention was offered at trial as a subject under inquiry. The questions on which Petitioner was convicted (R. 3) are not, in and of themselves, related to "Communist activity at Antioch College." Proof of a connection between those questions and the subject now claimed was introduced by the Government at trial not as part of its proof of pertinence but expressly in attempted refutation of Petitioner's contention of no legislative purpose (See Point III, *supra*, p. 51.)[33]

In these circumstances, the trial judge rather plainly found pertinence on the basis of a prohibited subject under inquiry—H. Res. 5 which established the Committee. And, in any event, no other subject under inquiry was proven beyond a reasonable doubt. The trial judge, no more than a jury, was free to speculate among the many possible subjects of inquiry the Gov-

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[33] Committee Counsel, Mr. Tavenner, was the Government's only witness on pertinence. During his testimony on direct, the Government introduced all of the many possible subjects of inquiry which it does not now claim (R. 32-60). Petitioner's cross-examination (R. 62-84, 91-99) was completely devoted to proving no legislative purpose. On redirect, the prosecutor with express reference to the testimony on lack of legislative purpose which petitioner had elicited on cross-examination (R. 105-106) went on, in attempted refutation of that testimony, to get such connection between the indictment questions and communism at Antioch College as the Government now relies on for pertinence (R. 109-112).

ernment touched on either as subjects under inquiry or in attempted refutation of no legislative purpose. The directed verdict requested by Petitioner (R. 19) should have been granted.[34]

CONCLUSION

The conviction should be reversed with directions to dismiss.

Respectfully submitted,

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[34] Of course, the Government cannot now, consistently with Due Process, support the conviction on the basis of a theory as to subject under inquiry not advanced at trial. See the cases cited *supra*, at p. 47.